NO. 42447-9-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHARLES N. DENNY,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Chris Wickham, Judge
Cause No. 10-1-01407-5

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 626-0148

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State of Washington

Federal Cases

Statutes

A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to vacate Denny's conviction for unlawful possession of a controlled substance.

02. The trial court erred in permitting Denny to be represented by counsel who provided ineffective assistance by failing to move to vacate the conviction for unlawful possession of a controlled substance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Denny's conviction for unlawful possession of a controlled substance must be vacated where he was convicted of both taking the controlled substance and possessing the controlled substance arising from the same conduct? [Assignment of Error No. 1].

02. Whether Denny was prejudiced as a result of his trial counsel's failure to move to vacate his conviction for unlawful possession of a controlled substance? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Charles N. Denny (Denny) was charged by first amended information filed in Thurston County Superior Court on May 26, 2011, with unlawful possession of hydrocodone, count I, and theft in the third degree, count II, contrary to RCWs, 69.50.4013(1), 9A.56.050(1) and 9A.56.200(1), respectively. [CP 4].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 7]. Trial to a jury commenced on July 26, the Honorable Chris Wickham presiding.

The jury found Denny guilty as charged, he was sentenced within his standard range and timely notice of this appeal followed. [CP 35-36, 41, 43, 48].

03. Substantive Facts[1]

Ryan Simons, who suspected that his live-in caregiver, Denny, was stealing some of his prescribed medication [RP 29, 34], set up a webcam in his bedroom where his hydrocodone pills were placed on an end table next to his bed "so that the Rite Aid labels on them were at 90-degree angles to each other." [RP 34]. He then left to go to the bank around 3:00 in the afternoon, returning within an hour [RP 34] to notice that the bottles had been moved and that "(t)here were a few less" pills. [RP 36-37].

When confronted by police approximately four hours later [RP 63], Denny quickly produced two hydrocodone pills from his pocket [RP 66-67, 76], saying he didn't think Simons would care because he had given him an oxycodone pill the evening before [RP 67, 91-92], which Simons

[1] All references to the Report of Proceedings are to the transcript entitled "JURY TRIAL."

confirmed, saying he had told Denny he could have the oxycodone pill he had dropped on the floor. [RP 40]. Though he was aware that as a certified caregiver he was prohibited from receiving medication from a patient, Denny said he had taken the hydrocodone pills because of pain resulting from a recent surgery. [RP 68-69].

Denny and his girlfriend, Kelly A [RP 105-07], asserted that Simons had on more than one occasion offered him pain pills, telling him on May of 2010 that if he was "'in that much pain (he) could take a couple of pills, just don't make a habit of it.'" [RP 85]. Denny declined. "Like I said, I don't like to pop pills, it's not my thing." [RP 87]. He admitted to removing "two hydrocodones from Simons's prescription bottle," the same two pills he later gave the police. [RP 94-95, 100].

D. ARGUMENT

01. DENNY'S CONVICTION FOR POSSESSION OF HYDROCODONE MUST BE VACATED BECAUSE HE CANNOT BE CONVICTED OF BOTH TAKING THE CONTROLLED SUBSTANCE AND POSSESSING THE CONTROLLED SUBSTANCE ARISING FROM THE SAME CONDUCT.

The principle that a person cannot be convicted of the taking and possession of the same property raises issues of statutory construction that this court reviews de novo. See State v. Allen, 150 Wn.

App. 300, 307, 207 P.d 483 (2009); United States v. Tyler, 466 F.2d 920 (9th Cir. 1972).

Dissenting in Milanovich v. United States, 365 U.S. 551, 558, 5 L. Ed. 2d 773, 81 S. Ct. 728 (1961), Justice Frankfurter explained:

> It is hornbook law that a thief cannot be charged with committing two offenses - - that is, stealing and receiving goods he has stolen. E.g., Cartwright v. United States, 146 F. 2d 133; State v. Tindall, 213 S.C. 484, 50 S.E. 2d 188; see 2 Wharton, Criminal Law and Procedure, section 576; 136 A.L.R. 1087. And this is so for the commonsensical, if not obvious, reason that a man who takes property does not at the same time give himself the property he has taken. In short, taking and receiving, as a contemporaneous - - indeed a coincidental - - phenomenon, constitute one transaction in life and, therefore, not two transactions in law.

In State v. Hancock, 44 Wn. App. 297, 721 P.2d 1006 (1986), where the defendant was convicted of first degree theft of 139 cases of cheese and first degree possession of stolen property of the same cheese, Division I of this court, relying on the rationale expressed in Milanovich above, reversed the possession conviction, holding that "one cannot be both the principal thief and the receiver of stolen goods." Hancock, 44 Wn. App. at 301. Similarly, in State v. Melick, 131 Wn. App. 835, 129 P.3d 816 (2006), where the defendant was convicted of both theft of a motor vehicle and possession of stolen property of the same vehicle arising out of the same act, the court reversed Melick's conviction for

possession of stolen property, holding that "when the evidence does not support a possession separated in time or by actor from the original theft, only the theft conviction may stand." Melick, 131 Wn. App. at 843.

Here, there was no possession "separate in time or by actor from the original" taking, and, in any event, continuous possession does not disturb the outcome. In Hancock, 44 Wn. App. at 301-02, the defendant continuously possessed the stolen goods for 24 days, and the court still dismissed the possession charge. Under the circumstances of this case, Denny's conviction for possession of hydrocodone must be vacated, for when "the defendant is convicted of both taking and possession, the proper remedy is to dismiss the possession charge...." Melick, 131 Wn. App. at 844.

02. DENNY WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO MOVE TO VACATE HIS CONVICTION FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE.[2]

A criminal defendant claiming ineffective assistance must prove: (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that

[2] While it is submitted that the argument that a defendant may not be convicted of theft of a controlled substance and unlawful possession of the controlled substance arising from the same conduct is error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the result of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

While the invited error doctrine precludes review of error invited by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)).

Should this court find that trial counsel waived the issue relating to the vacation of the conviction for unlawful possession of a controlled substance for the reasons set forth in the preceding section, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal, nor could it, any tactical or strategic reason why trial counsel failed to move to vacate the charge of unlawful possession of a controlled substance. For the reasons set forth in the preceding section of this brief, had counsel done so, Denny's conviction for unlawful possession of a controlled substance would not stand.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: again, for the reasons set forth in the preceding section of this brief, but for counsel's failure to properly act, Denny's conviction for unlawful possession of a controlled substance would not stand.

E. CONCLUSION

Based on the above, Denny respectfully requests this court to reverse and dismiss his conviction for unlawful possession of a controlled substance consistent with the argument presented herein.

//

//

DATED this 24th day of January 2012.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated.

Carol La Verne	Charles N. Denny
Deputy Pros Atty	20102 67th Ave. N.E.
2000 Lakeridge Drive S.W.	Arlington, WA 98223
Olympia, WA 98502	

DATED this 24th day of January 2012.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

DOYLE LAW OFFICE

January 24, 2012 - 2:35 PM

Transmittal Letter

Document Uploaded: 424479-Appellant's Brief.pdf

Case Name: State v. Denny

Court of Appeals Case Number: 42447-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Thomas E Doyle - Email: **ted9@me.com**

A copy of this document has been emailed to the following addresses:

paoappeals@co.thurston.wa.us